



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

New York Regional Office
Brookfield Place, 200 Vesey St., Suite 400
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**DIVISION OF
ENFORCEMENT**

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June 9, 2015

BY ECF

The Honorable Gary L. Sharpe
United States District Judge
United States District Court
Northern District of New York
United States Courthouse
Albany, New York 12207

Re: SEC v. McGinn, Smith & Co., Inc., et al., 10-cv-457 (GLS)(CFH)

Dear Judge Sharpe:

Pursuant to Federal Rule of Civil Procedure 58 and Local Civil Rule 58.1, plaintiff Securities and Exchange Commission respectfully submits for the Court's consideration and approval the following proposed judgments:

- Final Judgment as to Defendant David L. Smith;
- Final Judgment as to Defendant Timothy M. McGinn; and
- Final Judgment as to Lynn A. Smith, Lauren T. Smith, Geoffrey R. Smith, and Nancy McGinn.

These proposed Final Judgments reflect the Court's Memorandum-Decision and Orders dated February 17, 2015 (Dkt. 807) and March 30, 2015 (Dkt. 816) (the "MDOs"), which granted the SEC's motion for summary judgment and imposed various forms of relief.

Local Rule 58.1 provides that "[u]nless the Court specifically directs otherwise, the clerk shall promptly prepare the judgment." To date, however, final judgments have not been entered as to David Smith, Timothy McGinn, Lynn, Lauren and Geoffrey Smith, and Nancy McGinn.¹ Accordingly, the SEC has prepared the proposed Final Judgments for the Court's review.

Four weeks ago, we provided draft Final Judgments to counsel for David Smith, Timothy McGinn, Lynn, Lauren and Geoffrey Smith, Nancy McGinn (who is *pro se*) and the Receiver. Although the SEC subsequently modified the draft Final Judgments to address certain concerns, the parties were not able to agree on all aspects.

¹ With regard to the remaining defendants, the 3/30/15 MDO (at 54) ordered that "the Clerk defer entering judgment as against the Four Funds, MS & Co., MS Advisors, and MS Capital pending further direction from the court."

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In particular, counsel for Lynn Smith, joined we understand by counsel for Geoffrey and Lauren Smith, argues that the assets in the Stock Account, the Smith Trust, the Checking Account, as well as the proceeds from the sale of the Vero Beach House and the Sacandaga Lake Property, should not be applied in full to the disgorgement order. The 3/30/15 MDO, however, plainly states that “the following assets may be applied in order to satisfy the disgorgement order: (1) the Stock Account; (2) the Smith Vero Beach House; (3) the Checking Account; and (4) the Smith Trust.” MDO dated 3/30/15, Dkt. 816, at 54. The proposed Final Judgments incorporate this ruling.

The objections raised by Lynn Smith appear to be based on her disagreement with the Court’s rulings in the MDOs, and do not constitute a reasonable basis for opposing entry of Final Judgments. The Smith defendants are already pursuing appeals of the Court’s rulings (Dkt. 822, 824, 827), and their arguments should be directed to the Second Circuit rather than in opposition to this Court’s entry of Final Judgments.

Accordingly, we respectfully request that the Court schedule a hearing (telephonic or in-person) or order briefing regarding entry of the proposed Final Judgments. Given the pendency of the appeals, it is in all parties’ interests that Final Judgments be entered.

Respectfully submitted,

/s

David Stoelting

Attachments:

- [Proposed] Final Judgment as to Defendant David L. Smith
- [Proposed] Final Judgment as to Defendant Timothy M. McGinn
- [Proposed] Final Judgment as to Lynn A. Smith, Lauren T. Smith, Geoffrey R. Smith, and Nancy McGinn

cc (w/enclosures): James Featherstonhaugh, Esq. (by email and UPS)
E. Stewart Jones, Esq. (by email and UPS)
William Dreyer, Esq. (by email and UPS)
Nancy McGinn, *pro se* (by email and UPS)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff, 1:10-cv-457 (GLS/CFH)

v.

McGINN SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN,
DAVID L. SMITH,
LYNN A. SMITH,
GEOFFREY R. SMITH, Individually and as Trustee of the David
L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,
LAUREN T. SMITH, and
NANCY McGINN,

Defendants,

LYNN A. SMITH and
NANCY McGINN,

Relief Defendants,

GEOFFREY R. SMITH, Individually and as Trustee of the David
L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenors.

[PROPOSED] FINAL JUDGMENT AS TO DEFENDANT DAVID L. SMITH

The Court, on February 17, 2015 and March 30, 2015, having issued Memorandum-Decision and Orders (Dkt. 807, 816) granting plaintiff Securities and Exchange Commission's motion for summary judgment on the First, Second, Third, Fourth, Sixth and Eighth Claims for

Relief alleged in the Second Amended Complaint (Dkt. 334) as to defendant David L. Smith (“Smith”); and it appearing that a Final Judgment against Smith should enter:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is permanently enjoined and restrained from violating Section 17(a) of the Securities Act of 1933 (the “Securities Act”) [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;
or
- (c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Smith’s officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Smith or with anyone described in (a).

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Smith’s officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Smith or with anyone described in (a).

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is permanently restrained and enjoined from violating, or aiding and abetting any violation of, Section 15(c)(1) of the Exchange Act [15 U.S.C. § 78o(c)(1)] and Rule 10b-3 promulgated thereunder [17 C.F.R. § 240.10b-3] by knowingly or recklessly providing substantial assistance

to any broker or dealer (i) that makes use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), or any security-based swap agreement by means of any manipulative, deceptive, or other fraudulent device, (ii) that makes use of the mails or any instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictional quotation, or (iii) that makes use of the mails or any instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security (except a government security) or commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe pursuant to such statute.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Smith's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Smith or with anyone described in (a).

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is permanently restrained and enjoined from violating Sections 206(1), 206(2) and 206(4) of the Investment Advisors Act of 1940 [15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(4)] and Rule

206(4)-8 promulgated thereunder [17 C.F.R. § 275.206(4)-8] by the use of the mails or by any means or instrumentality of interstate commerce, directly or indirectly, (i) to employ any device, scheme, or artifice to defraud any client or prospective client, (ii) to engage in any transaction, practice, or course of business which operates as fraud or deceit upon any client or prospective client, or (iii) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Smith's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Smith or with anyone described in (a).

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

- (a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;
- (b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or

- (c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Smith's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Smith or with anyone described in (a).

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is liable for disgorgement of \$87,433,218, representing profits gained as a result of the conduct alleged in the Second Amended Complaint, together with prejudgment interest thereon in the amount \$11,668,132, for a total of \$99,101,350. This liability for disgorgement and prejudgment interest (and for postjudgment interest pursuant to 28 U.S.C. § 1961) shall be a joint and several liability of Defendant Smith and Defendant Timothy M. McGinn. Defendant Smith shall satisfy this obligation by paying \$99,101,350 to William J. Brown, Esq., the Receiver appointed herein (the "Receiver"), within 14 days after entry of this Final Judgment.

By making this payment, Defendant Smith relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant Smith.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Final Judgment. Defendant Smith shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that:

A. Smith is a joint owner of the brokerage account in the name of Lynn A. Smith ("L. Smith"), account number RMR-040916 (the "Stock Account"), and the Stock Account's assets, including all cash and securities, shall be treated as an asset of Smith's and shall be applied to Smith's payment obligations under this Final Judgment;

B. Smith is a beneficial owner of the assets of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the "Smith Trust"), including account number RMR-069671; therefore, the Smith Trust's assets, including all cash and securities, shall be treated as an asset of Smith's and shall be applied to Smith's payment obligations under this Final Judgment;

C. Smith's transfers to L. Smith of the title to a home at 906 Orchid Point Way, Vero Beach, Florida (the "Vero Beach Property"), and a joint checking account at Bank of America (the "BOA Account"), which had both been held jointly with L. Smith, are hereby declared to have been fraudulent conveyances made by Smith in violation of Section 276 of the New York Debtor and Creditor Law, and these transfers are hereby set aside;

D. The five transfers made from the Smith Trust following the decision of the Court on July 7, 2010 which, among other things, vacated the asset freeze as to the Smith Trust, are hereby declared to have been fraudulent conveyances made by Smith and L. Smith in violation of Section 276 of the New York Debtor and Creditor Law, and these five transfers are hereby set aside. The five transfers are:

- i. The July 9, 2010 transfer of \$95,741 to the Dunn Law Firm;
- ii. The July 12, 2010 transfer of \$96,500 to Geoffrey R. Smith;
- iii. The July 12, 2010 transfer of \$83,000 to Lauren T. Smith;
- iv. The July 16, 2010 transfer of \$200,000 to Geoffrey R. Smith; and
- v. The July 23, 2010 transfer of \$449,878 to Lynn A. Smith;

E. Smith shall return the fraudulently conveyed assets listed in Section VII(D)(i)-(v) to the Receiver, or their equivalent value.

F. The assets of the Stock Account and the Smith Trust, and the assets in the BOA Account, shall be delivered to the Receiver, and the Receiver is authorized to take custody of these assets and to apply them in partial satisfaction of Smith's payment obligations in this Final Judgment.

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the Receiver shall hold all payments received from the Defendant Smith and from or with respect to other Defendants and Relief Defendants in this action. Any payments or recoveries delivered to the Receiver in satisfaction of the Final Judgments entered, together with the funds in the possession of the Receiver, including the proceeds of the sales of the Sacandaga Lake Property and the Vero Beach Property, shall be referred to as the Distribution Fund. The Receiver shall submit to the Court a proposed Plan of Distribution.

Any assets recovered by or under the control of the Receiver collected from the Defendant Smith pursuant to the prior orders of this Court are deemed to be assets of the Distribution Fund effective upon the entry of this Final Judgment.

The Receiver is authorized to liquidate and monetize any assets recovered from or on behalf of or in connection with Defendant Smith and to deposit the proceeds thereof in an appropriate account.

To the extent that further legal action is required to obtain custody over any assets of the Defendant Smith, the Commission or the Receiver is authorized to file a motion in this action seeking relief pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and New York Civil Practice Law and Rules 5225 and/or 5227, or such other provision of law as may be appropriate, seeking to have such assets turned over to the Receiver.

IX.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, any debt for disgorgement, prejudgment interest, or other amounts due by Defendant

Smith under this Final Judgment or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant Smith of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

X.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

XI.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Dated: Albany, New York
_____, 2015

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff, 1:10-cv-457 (GLS/CFH)

v.

McGINN SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN,
DAVID L. SMITH,
LYNN A. SMITH,
GEOFFREY R. SMITH, Individually and as Trustee of the David
L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,
LAUREN T. SMITH, and
NANCY McGINN,

Defendants,

LYNN A. SMITH and
NANCY McGINN,

Relief Defendants,

GEOFFREY R. SMITH, Individually and as Trustee of the David
L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenors.

[PROPOSED] FINAL JUDGMENT AS TO DEFENDANT TIMOTHY M. McGINN

The Court, on February 17, 2015 and March 30, 2015, having issued Memorandum-
Decision and Orders (Dkt. 807, 816) granting plaintiff Securities and Exchange Commission's
motion for summary judgment on the First, Second, Third, Fourth, Sixth and Eighth Claims for

Relief as to defendant Timothy M. McGinn (“McGinn”); and it appearing that a Final Judgment against McGinn should enter:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that Defendant McGinn is permanently enjoined and restrained from violating Section 17(a) of the Securities Act of 1933 (the “Securities Act”) [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;
or
- (c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant McGinn’s officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant McGinn or with anyone described in (a).

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant McGinn is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant McGinn’s officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant McGinn or with anyone described in (a).

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant McGinn is permanently restrained and enjoined from aiding and abetting any violation of Section 15(c)(1) of the Exchange Act and Rule 10b-3 promulgated thereunder [17 C.F.R. § 240.10b-3] by knowingly or recklessly providing substantial assistance to any broker or dealer (i)

that makes use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), or any security-based swap agreement by means of any manipulative, deceptive, or other fraudulent device, (ii) that makes use of the mails or any instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictional quotation, or (iii) that makes use of the mails or any instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security (except a government security) or commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe pursuant to such statute.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant McGinn's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant McGinn or with anyone described in (a).

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant McGinn is permanently restrained and enjoined from violating Sections 206(1), 206(2) and 206(4) of the Investment Advisors Act of 1940 [15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(4)]

and Rule 206(4)-8 promulgated thereunder [17 C.F.R. § 275.206(4)-8] by the use of the mails or by any means or instrumentality of interstate commerce, directly or indirectly, (i) to employ any device, scheme, or artifice to defraud any client or prospective client, (ii) to engage in any transaction, practice, or course of business which operates as fraud or deceit upon any client or prospective client, or (iii) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant McGinn's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant McGinn or with anyone described in (a).

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant McGinn is permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

- (a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;
- (b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or

- (c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant McGinn's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant McGinn or with anyone described in (a).

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)] , Defendant McGinn is prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the Defendant McGinn is liable for disgorgement of \$87,433,218, representing profits gained as a result of the conduct alleged in the Second Amended Complaint, together with prejudgment interest thereon in the amount \$11,668.132, for a total of \$99,101,350. This liability for disgorgement and

prejudgment interest (and for postjudgment interest pursuant to 28 U.S.C. § 1961) shall be a joint and several liability of the Defendant McGinn and the Defendant David L. Smith. Defendant McGinn shall satisfy this obligation by paying \$99,101,350 to William J. Brown, Esq., the Receiver appointed herein (the “Receiver”), within 14 days after entry of this Final Judgment.

By making this payment, Defendant McGinn relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant McGinn.

The Commission may enforce the Court’s judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Final Judgment. Defendant McGinn shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the transfer of real property located at 26 Port Huron Drive, Niskayuna, New York (the “Niskayuna Property”), from McGinn to the Defendant and Relief Defendant Nancy A. McGinn (“N. McGinn”) in October 2009 is hereby declared to have been a fraudulent conveyance made by McGinn in violation of Section 276 of the New York Debtor and Creditor Law, and this transfer is hereby set aside. The Niskayuna Property was sold by the Receiver pursuant to an order of the Court dated February 11, 2011 (Dkt. 276). The Receiver is authorized to apply the proceeds of the sale of the Niskayuna Property that are in his possession to the Distribution Fund.

IX.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the Receiver shall hold all payments received from the Defendant McGinn and from or with respect to other Defendants and Relief Defendants in this action. Any payments or recoveries delivered to the Receiver in satisfaction of the Final Judgments entered, together with the funds in the possession of the Receiver, shall be referred to as the Distribution Fund. The Receiver shall submit to the Court a proposed Plan of Distribution.

Any assets recovered by or under the control of the Receiver collected from the Defendant McGinn pursuant to the prior orders of this Court are deemed to be assets of the Distribution Fund effective upon the entry of this Final Judgment.

The Receiver is authorized to liquidate and monetize any assets recovered from or in connection with Defendant McGinn and to deposit the proceeds thereof in an appropriate account.

To the extent that further legal action is required to obtain custody over any assets of the Defendant McGinn, the Commission or the Receiver is authorized to file a motion in this action seeking relief pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and New York Civil Practice Law and Rules 5225 and/or 5227, or such other provision of law as may be appropriate, seeking to have such assets turned over to the Receiver.

X.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, any debt for disgorgement, prejudgment interest, or other amounts due by Defendant McGinn under this Final Judgment or any other judgment, order, consent order, decree or

settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant McGinn of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

XI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

XII.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Dated: Albany, New York
_____, 2015

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff, 1:10-cv-457 (GLS/CFH)

v.

McGINN SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN,
DAVID L. SMITH,
LYNN A. SMITH,
GEOFFREY R. SMITH, Individually and as Trustee of the David
L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,
LAUREN T. SMITH, and
NANCY McGINN,

Defendants,

LYNN A. SMITH and
NANCY McGINN,

Relief Defendants,

GEOFFREY R. SMITH, Individually and as Trustee of the David
L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenors.

**[PROPOSED] FINAL JUDGMENT AS TO LYNN A. SMITH,
LAUREN T. SMITH, GEOFFREY R. SMITH, AND NANCY MCGINN**

The Court, on March 30, 2015, having issued a Memorandum-Decision and Order (Dkt. 816) granting plaintiff Securities and Exchange Commission's motion for summary judgment on the Eighth Claim for Relief as alleged in the Second Amended Complaint (Dkt. 334) as to

defendants Lynn A. Smith (L. Smith”), Geoffrey R. Smith (“G. Smith”), Lauren T. Smith (L.T. Smith) and Nancy McGinn (“N. McGinn”), and it appearing that a Final Judgment against L. Smith, G. Smith, L.T. Smith and N. McGinn should enter:

I.

IT IS ORDERED, ADJUDGED, AND DECREED that the following transfers, which were made in violation of § 276 of the New York Debtor and Creditor Law, are declared void and are hereby set aside:

1. The transfer in October 2009 by Defendant Timothy McGinn (“T. McGinn”) of title to a house located at 26 Port Huron Drive, Niskayuna, New York (the “Niskayuna Property”), to Nancy McGinn; the Niskayuna Property was sold by the Receiver pursuant to an order of the Court dated February 11, 2011 (Dkt. 276);
2. The transfer in 2009 by David L. Smith (“D. Smith”) and L. Smith of a house at 906 Orchid Point Way, Vero Beach, Florida (the “Vero Beach Property”), which had been held jointly, to L. Smith;
3. The transfer in 2009 by D. Smith and L. Smith of a joint checking account at Bank of America (the “BOA Account”), to L. Smith;
4. The transfer on or about July 9, 2010 by D. Smith and L. Smith from the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the “Smith Trust”), account number RMR-069671, following the decision of the Court on July 7, 2010 which, among other things, vacated the asset freeze as to the Smith Trust, of \$95,741 to the Dunn Law Firm;
5. The transfer by D. Smith and L. Smith on July 12, 2010 of \$96,500 from the Smith Trust to G. Smith;

6. The transfer by D. Smith and L. Smith on or about July 12, 2010 of \$83,000 from the Smith Trust to L.T. Smith;
7. The transfer by D. Smith and L. Smith on or about July 16, 2010 of \$200,000 from the Smith Trust to G. Smith; and
8. The transfer by D. Smith and L. Smith on or about July 23, 2010 of \$449,878 from the Smith Trust to L. Smith.

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that L. Smith, as one of the transferors of the fraudulent transfers listed in Section I(2) through I(8) above, shall be jointly and severally liable, together with D. Smith, for the return all such fraudulently transferred assets, or their equivalent value, to the Receiver, subject to the offset in Section III below.

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the following transferees identified in Section I above shall be jointly and severally liable with D. Smith and L. Smith for the return all assets fraudulently conveyed to them, or their equivalent value, to the Receiver, William J. Brown, Esq. (the "Receiver"), as follows:

1. G. Smith shall return the July 12, 2010 transfer to him of \$96,500, and the July 16, 2010 transfer to him of \$200,000.
2. L.T. Smith shall return the July 12, 2010 transfer to her of \$83,000; and
3. L. Smith shall return the July 23, 2010 transfer to her of \$449,878.

Offset for the Receiver's Sale of the Sacandaga Lake Property. In July 2010, L. Smith purported to transfer title to the Sacandaga Lake Property from herself to the Smith Trust in exchange for a total of \$599,478. Of the \$599,478 that was transferred to L. Smith, G. Smith transferred \$75,000 to L. Smith from the funds he received from the Smith Trust, *see* Section I(5) above); and L.T. Smith transferred \$75,000 to L. Smith from the funds she received from the Smith Trust, *see* Section I(6) above. The Receiver subsequently sold the Sacandaga Lake Property pursuant to the Court's Memorandum-Decision and Order dated November 22, 2013, Dkt. 647, and realized \$474,751 in net proceeds after expenses. Accordingly, G. Smith's payment obligation under this Final Judgment shall be reduced by \$75,000.00; L. T. Smith's payment obligation shall be reduced by \$75,000.00; and L. Smith's payment obligation shall be reduced by \$324,751.

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Receiver shall apply all proceeds of all payments and transfers to him pursuant to this Final Judgment, including the proceeds of the sale of the Sacandaga Lake Property, the Niskayuna Property and the Vero Beach Property, and the assets in the Smith Trust and the BOA Account, to the Distribution Fund for the benefit of the defrauded investors.

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

VI.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Dated: Albany, New York
_____, 2015

UNITED STATES DISTRICT JUDGE